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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WESTERN CAB COMPANY and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	**Case Nos.:**	**28-CA-131426** **28-CA-132767** **28-CA-135801**

WESTERN CAB COMPANY'S BRIEF IN RESPONSE TO: (1) GENERAL COUNSEL'S 11/10/15 ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND (2) CHARGING PARTY'S 11/12/15 RESPONSE TO WESTERN CAB COMPANY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

General Counsel and the Union have challenged Western Cab's Cross-Exceptions to ALJ Sotolongo's September 2, 2015, Decision, on the same three grounds: (1) the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012), is good law and should have been applied to this case despite the Supreme Court's vacation of *Alan Ritchey* by *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014); (2) notice to a union bargaining committee member of terminations or other discipline for serious misconduct in an industry known for high-employee turnover did not constitute notice to the union; and (3) Western Cab was required to have

bargained as to the Affordable Care Act's ("ACA's") mandatory implementation of a 90-day eligibility period.

I. THE SUPREME COURT'S INVALIDATION OF *ALAN RITCHEY* LEAVES *FRESNO BEE* CONTROLLING LAW

The Union and General Counsel pretend *Noel Canning* does not exist, arguing that *Alan Ritchey* still effectively invalidated the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002). That position is untenable. As explained in *Ready Mix USA, LLC*, 2015 WL 5440337, pp. 23-24 (September 15, 2015), *Fresno Bee* is still the law and employers should not be punished as if *Alan Ritchey*, establishing a new standard, had not been invalidated by *Noel Canning*, and that the *Alan Ritchey* standard – or some other standard – does not have to be established by a new Board decision:

> The General Counsel concedes... that in light of *Noel Canning*..., *Alan Ritchey* 'is no longer considered binding precedent.' He contends, nonetheless, that its rationale should apply because *Alan Ritchey* was 'an application of longstanding Board precedent requiring employers to bargain over discretionary aspects of changes it intends to make after a bargaining representative has been selected.' [Citation omitted.]
>
> Of course, there is a problem with that. Even were I to proclaim agreement with the *Alan Ritchey* panel that the rationale of *Fresno Bee* was '"demonstrably incorrect,"' it remains the case that before *Alan Ritchey* there was *Fresno Bee*, and under *Fresno Bee* and its rationale – which was adopted by the Board – the instant allegation of the complaint must be dismissed. *Alan Ritchey* overruled *Fresno Bee*, but ***Alan Ritchey is not precedent.*** That leaves *Fresno Bee*, wrong as it may be, in place. In any event, ***even were one to ignore Fresno Bee, as the Board made clear in Alan Ritchey, the general application of its principles was not so clear that the Board was willing to apply the decision in Alan Ritchey retroactively. That was also a part of Alan Ritchey's rationale, but not a part that General Counsel wants me to apply here.***
>
> Some believe that the Board will reaffirm *Alan Ritchey*'s principles. It may or it may not. And if it does, it may or may not once more decline to apply the principals retroactively. I agree with the Respondent's position on this: ***'the Administrative Law Judge must apply Board precedent as it finds it.'*** [Citation omitted.] ***It is not my position to guess or anticipate what the Board will do in the future, but rather to apply the Board's precedents as best I can.*** While *Alan Ritchey* is not precedent, *Waco, Inc., Inc.*, 273 NLRB 746, 749 fn. 14 (1984, is: 'We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. ***It is for the Board, not the judge, to determine whether that precedent should be varied'*** (citation omitted.). Accord, *Los Angeles*

New Hospital, 244 NLRB 960, 962 n. 4 (1979), enf'd. 640 F.2d 1017 (9th Cir. 1981). I will dismiss this allegation. [Emphasis added.]

As to General Counsel and the Union's reliance on the decisions relied upon in *Alan Ritchey* (*e.g.*, *NLRB v. Katz*, 369 U.S. 736 (1962), *Oneita Knitting Mills*, 205 NLRB 500 (1973), and *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001), *McKesson Corporation*, 2014 WL 5682510, 25 (November 14, 2014)), observes that *Alan Ritchey* was "unusual" in that "[i]t extended existing law enough that the Board decided to apply its holding prospectively" and following the "law as it existed before *Alan Ritchey* issued." *See also*, *Adams & Associates, Inc.*, 2015 WL 3759560, p. 16 (June 16, 2015) ("until [*Alan Ritchey*] is reaffirmed or adopted by the Board, it is not controlling").

Alan Ritchey is void and contrary to the General Counsel's Brief, p. 2, might actually be the "outlier" decision as opposed to *Fresno Bee*, and to apply its reasoning absent a valid and enforceable Board decision would violate well-settled Board practice and fundamental due process. Thus, as General Counsel and the Union urge, if the Board again overrules *Fresno Bee*, its holdings likely will be applied to future cases, as in *Alan Ritchey*, but they should not be applied retroactively absent Board direction.

II. A BARGAINING COMMITTEE MEMBER'S NOTICE OF DISCIPLINE IN RESPONSE TO SERIOUS EMPLOYEE MISCONDUCT, PARTICULARLY GIVEN THE CAB INDUSTRY'S WELL-KNOWN HIGH-TURNOVER, CONSTITUTES ADEQUATE AND FAIR NOTICE TO THE UNION

ALJ Sotolongo concluded (1) there were "no allegations let alone a scintilla of evidence, that employees were disciplined for discriminatory reasons proscribed by the Act, that is, engaging in union protected activity;" (2) there was no evidence that Western Cab "had unilaterally created new rules that were the direct and proximate cause of the employees' discipline;" (3) the "undisputed testimony" demonstrated that employee conduct, including "leaving the scene of an accident or failing to report one, unexcused absences, improperly filling out daily logs

(intentionally or otherwise), failing to report fares, getting arrested (while on the job), tardiness, etc.," constituted "for cause" discipline; and (4) the "undisputed testimony" established that Western Cab "has been imposing identical discipline for similar reasons for years, long before the union came into the picture." Decision, p. 11: 18-24. ALJ Sotolongo also considered the frequency of "for cause" disciplinary events in certain "high-turnover 'revolving-door'" types of businesses, including Western Cab. *Id.*, fn. 16.

The Union would have also understood the high-turnover nature of Western Cab's business and also had notice of individual disciplinary events through the knowledge of its bargaining committee member, Mr. Teffera. Contrary to the Union's and General Counsel's positions, the notice required does not have to be formal, but is satisfied by notice actually received by the union representative, which is imputed to the union. Thus, in *Hartmann Luggage Co.*, 173 NLRB 1254 (1968), the company's failure to give formal notice directly to the union did not render ineffective or inoperative the notice deemed received by the union as a result of the knowledge of an employee-member of the union's bargaining committee. *Hartmann* concluded that though notice to the bargaining committee member, the union had received notice and then, having failed to act diligently, it had thereby waived its right to demand discussion or bargaining. *See also*, *Kansas Nat'l Education Ass'n*, 275 NLRB 92 (1985), *citing Hartmann* at n. 8 of the affirmed ALJ's decision ("The union's obligation to request bargaining arises upon actual notice even if such notice is received from a source other than directly from the employer"); *In re K-Mart Corp.*, 2002 WL 1840921, p. 21 (August 8, 2002), *citing Hartmann Luggage* and concluding that where a union committee member had adequate actual notice of the company's need for immediate drastic staff reduction in its Washington, D.C. store within days after the 9/11/01 terror attacks, the union had notice as well: "Overall, it appears that the circumstances facing Respondent in December 2001 were extraordinary unforeseen events have a major economic effect that required the

employer to take immediate action.").

The employee conduct giving rise to the discipline at issue in this case required Western Cab to take immediate action to protect itself, its other employees, its customers and the general public. The nature of the cab business combined with Mr. Teffera's actual knowledge put the Union on notice of the continuing disciplinary issues and the need to demand discussion or bargaining if it wished to do so. Moreover, Western Cab agreed to engage in post-discipline bargaining immediately upon the Union's request. *See Concord Honda*, 2012 WL 2673279, *1 (Advice Memorandum, June 26, 2012), explaining that "[N]o duty to bargain prior to each imposition of discipline exists if the employer continues to issue discipline within the parameters of its preexisting progressive disciplinary system, even if that system provides the employer with a degree of discretion. ***The employer does have an obligation to engage in post-discipline bargaining upon request.***" [Emphasis added.]

III. WESTERN CAB DID NOT VIOLATE ANY OBLIGATION TO BARGAIN WHEN IT IMPLEMENTED THE ACA'S MANDATORY 90-DAY ELIGIBILITY PERIOD FOR HEALTH CARE

The aspect of employee health care at issue here is not the type or value of coverage available or the employee's cost of coverage, or, even as in the Union's case, *Latino Express,* 360 NLRB 112 (2014), whether or not there is any health care coverage at all,[1] but very simply, the eligibility period for coverage – formerly a year at Western Cab, but reduced by ACA mandate to 90 days from start of employment. Compliance with a federal mandate cannot violate Section 8(a)(5) and in this regard the Union's attempt to distinguish *Standard Candy*, 147 NLRB No. 116 (1964), fails. Thus, the Union concedes at p. 7 of its Response that where Standard Candy raised the wages of its bargaining unit employees making less than federal minimum wage to the

[1] *See*, 360 NLRB 112, at p. 6 ("There was no agreement on health care, as the Employer's position was that it was not prepared to offer any health care coverage at this time, and wanted to evaluate the situation after the Affordable Health care Act was in effect."

minimum wage level, it had not violated the Act. But, the Union ignores this point, arguing instead that when Standard Candy raised the wages of the members of the bargaining unit already making the minimum wage or more, the company had violated the Act. But, the second scenario has no applicability in this case as there is no distinction among members of the bargaining unit– they were all treated equally with regard to the ACA-mandated eligibility period for health insurance — 90 days. Were one to substitute Western Cab's compliance with the ACA's 90-day eligibility mandate for Standard Candy's compliance with the federal minimum wage, one would reach precisely the result that Western Cab is urging the Board to take here – recognition that Western Cab's compliance with the ACA eligibility period as to ***all*** bargaining unit employees did not violate Section 8(a)(5) or (1) of the Act:

> Here, of course, the Company was required to comply with the new minimum wage rate established under FLSA and, accordingly, raised the pay rate for seven of its employees from $1.15 to $1.25 an hour, I find the Company did not violate the Act in adopting these wage changes.
>
> However, the Company unilaterally granted pay increases to the remaining employees in the unit, some 113 in number, which exceeded the minimum wage and were granted for the purpose of maintaining the wage differentials. By granting these increases, under the circumstances herein, I find the Company engaged in acts and conduct in violation of Section 8(a)(5) and (1) of the Act.

Id., at p. 5; *see also*, *EEOC v. AT&T*, 365 F. Supp. 1105, 1129 (E.D. Pa. 1973), *citing Standard Candy* ("That there should be an accommodation of the various federal statutes has been recognized by courts in other contexts. [Citations omitted.] Similarly, the National Labor Relations Board has adopted the position that where unilateral changes in collective bargaining agreements are essential to comply with federal laws, these revisions would not constitute unfair labor practices").

General Counsel's efforts to distinguish *Standard Candy* is unconvincing, dealing with decisions which obviously require exercise of the employer's discretion, *e.g.*, *Hanes Corp.*, 260 NLRB 557 (1982) (the OSHA mandate was for respirators with a good face-to-respirator seal, of

which there were several available); *Dickerson-Chapman, Inc.*, 313 NLRB 118 (1994) (OSHA's requirement of daily inspection of open excavation jobsites by a "competent person" defined as capable of identifying hazards or dangerous conditions and taking corrective measures to eliminate them, obviously required the exercise of discretion); and *Warren Unilube, Inc.*, 358 NLRB 92 (2012) (while OSHA's "general duty clause" might have allowed unilateral action, implementation of a new cell phone and radio policy on the job site did not). None of these decisions is analogous to Western Cab's compliance with ACA's mandate of a 90-day health care eligibility period.

Finally, the Union's efforts to cast Western Cab's compliance with the ACA as a disparagement of the union in the eyes of the bargaining unit fails as a matter of logic and law. For example, its reliance on *Lee Lumber*, 322 NLRB 175 (1996), is hardly convincing as that case did not evolve from the employer's compliance with a federal mandate and the U.S. Court of Appeals ultimately determined that the Board had been irrational in its determination that the employer had not resumed bargaining for a reasonable period of time before it withdrew recognition from the union. *Lee Lumber and Building Corp. v. NLRB*, 117 F.3d 1454, 1460 (D.C. App. 1997).

Western Cab's response to the ACA is not different from Standard Candy's response to the minimum wage law as to its below-minimum wage bargaining unit employees. Western Cab applied the 90-day eligibility period mandated by federal law equally across the board of its bargaining unit employees. Western Cab was not required to bargain with the Union in advance of complying with the ACA's mandate as to the 90-day eligibility period and the ALJ's Decision is incorrect in this regard.

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IV. CONCLUSION

For the reasons stated above and in Western Cab's other filings, the ALJ's Decision should not be modified as requested by the Union or General Counsel.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **WESTERN CAB COMPANY'S BRIEF IN RESPONSE TO: (1) GENERAL COUNSEL'S 11/10/15 ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND (2) CHARGING PARTY'S 11/12/15 RESPONSE TO WESTERN CAB COMPANY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE** was served via E-Gov, E-Filing, on this 23rd day of November, 2015, on the following parties:

Gary Shinners
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And a true and correct copy was served via e-mail on this 23rd day of November, 2015 to the following:

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